

No. 25-1095

In the Supreme Court of the United States

DAVID W. SUNDAY, JR., ATTORNEY GENERAL OF
PENNSYLVANIA, AND DARRYL A. LAWRENCE,
PENNSYLVANIA CONSUMER ADVOCATE,
Petitioners

v.

TRANSOURCE PENNSYLVANIA, LLC,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The Third Circuit's unexplained denial of intervention cannot be reconciled with this Court's decisions in *Cameron* and *Berger*.¹ And it is inconsistent with the plain text of the Commonwealth Attorneys Act, as interpreted by the Pennsylvania Supreme Court, which allows the Attorney General to intervene in any forum, at any time, to defend any constitutional challenge to any Pennsylvania statute. It is thus unsurprising that in its flailing effort to prop-up the Third Circuit's indefensible ruling, Transource offers nothing more than specious arguments.

I. TRANSOURCE'S ASSERTION THAT STATE LAW AUTHORITY TO INTERVENE MUST BE "UNDISPUTED" IS FALSE.

As detailed in the petition, Petitioners' intervention request checks all the boxes this Court established in *Berger* and *Cameron*. Transource contends that those rulings are distinguishable because the authority to intervene in those cases was supposedly "undisputed," see Respondent's Br. at 3, 15-18, while here, Petitioners' authority *is* disputed, namely, by Transource. This argument borders on frivolous.

Initially, Transource's contention that the respondents did not dispute the authority to intervene in *Berger* and *Cameron* is simply incorrect. In *Berger*, the Court specifically noted that the respondent disputed whether North Carolina law allowed the legislators to intervene. 597 U.S. at 193 ("[Respondent] submits only that, in fact, North Carolina law does not afford the legislative leaders that authority.").

¹ *Berger v. N. Carolina State Conference of the NAACP*, 597 U.S. 179, 192 (2022); *Cameron v. EMW Women's Surgical Ctr.*, 595 U.S. 267, 277-82 (2022).

The presence of a dispute in *Cameron* is less obvious, but the respondents did indeed contest the Kentucky Attorney General’s authority to intervene. Respondents maintained that his “general authority *** to defend Kentucky laws” did not authorize him to intervene in that particular case. No. 20-601, Respondents’ Br. at 38. Respondents even asked the Court to certify to the Kentucky Supreme Court “the precise contours of the Attorney General’s authority under Kentucky law” if “relevant to the intervention analysis.” *Id.* at 39 n.13.

In any event, there is nothing in *Berger* or *Cameron* suggesting that intervention is only allowed if the authority to intervene is “undisputed.” There is good reason why this Court did not adopt such a nonsensical requirement—it would give non-governmental parties like Transource an unchecked veto over a governmental party’s right to intervene. Under Transource’s free-wheeling rule, seemingly *any* dispute over the state actor’s authority, no matter how frivolous, would enable “a private plaintiff to pick its preferred defendants and potentially silence those whom the state deems essential to a fair understanding of its interests.” *Berger*, 597 U.S. at 195. And it would functionally “bring the case to an end,” conferring an “unrealized gain” upon the party challenging state law. *Cameron*, 595 U.S. at 292 (Kagan, J., concurring).

II. TRANSOURCE’S INTERPRETATION OF THE COMMONWEALTH ATTORNEYS ACT IS UNTENABLE

Transource maintains that the Attorney General “may not intervene in actions brought by or against the PUC.” Respondent’s Br. at 17. It comes to that conclusion by focusing myopically on the word “other” in 71

P.S. § 732-204(c). Transource’s statutory interpretation is nonsensical.

The clause permitting the Attorney General “to intervene in any *other* action” refers to actions in which the Attorney General is not already acting in a representative capacity. Where the Attorney General is representing a Commonwealth entity, there is obviously no reason for him to intervene. So, contrary to Transource’s characterization, Petitioners do not contend that “other” is mere surplusage.

Transource’s reading also violates basic rules of grammar. The subject of the first sentence of Section 732-204(c) is the Attorney General. There are two verbs relevant to that subject—“represent” and “intervene.” The first deals with the Attorney General’s obligation to *represent* the Commonwealth and Commonwealth agencies. The second permits the Attorney General to *intervene* “in any other action.” Representation and intervention are not synonymous.

The PUC may or may not request representation from the Attorney General. 71 P.S. § 732-204(c). If it does not, the Attorney General may intervene.

And, the Attorney General “may intervene in any other action” (other than one in which he is already acting in a representative capacity) “including those involving *** the constitutionality of *any* statute.” 71 P.S. § 732-204(c). “Read naturally *** ‘any’ has an expansive meaning, that is, ‘one or some indiscriminately of whatever kind.’” *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 219 (2008). Read as a whole, the Attorney General has a “duty to uphold and defend the constitutionality of *all* statutes” and the authority to intervene in a challenge to the “constitutionality of *any* statute.” 71 P.S. § 732-204(a)(3), (c).

Transource’s attempt to reconcile its limitation on the Attorney General’s authority to intervene with

these broad words of “all” and “any” is illogical. Transource contends that the Attorney General has a “duty” to defend “*all* statutes” but no “authority” when it comes to statutes the PUC enforces. It is axiomatic, however, that “everywhere in official life duty and power go hand in hand. Wherever a duty is imposed the power to perform it is conferred.” *Reeside v. U.S.*, 2 Ct. Cl. 1, 53 (U.S. Ct. of Claims 1866) (Casey, C.J., concurring). The Attorney General has the duty to defend all statutes; therefore, he must have the authority to fulfill that duty. The words “any” and “all” convey the breadth of that authority. And those words must be read alongside the Attorney General’s authority to intervene. *Samantar v. Yousuf*, 560 U.S. 305, 319 (2010).

Petitioners’ reading finds further support in provisions of the Commonwealth Attorneys Act that account for the possibility of a disagreement between the Attorney General and a Commonwealth agency or official he represents. Then, the statute permits the Governor’s counsel to intervene and represent the agency, while the Attorney General “shall at all times continue to represent the Commonwealth.” 71 P.S. §§ 732-303, 732-403; *Synthes USA HQ, Inc. v. Commonwealth*, 289 A.3d 846, 860 (Pa. 2023). These supersession provisions demonstrate that the Legislature intended for the Attorney General to speak for the Commonwealth “at all times,” even when there is disagreement between officials. There is no more important time for the Attorney General to speak for the Commonwealth than when the constitutionality of state law is challenged.

But even worse than Transource’s tortured logic and strained statutory interpretation is its reliance on irrelevant case law and repealed statutes. Respondent’s Br. at 20. Transource cites *City of York v. Pa. Pub. Util. Comm’n*, 295 A.2d 825, 831-32 (Pa. 1972). There, the Pennsylvania Supreme Court interpreted statutes

governing the right of a Commonwealth officer to intervene and the Attorney General's duty to represent agencies. *Ibid.* But, critically, that case *predates* the amendment establishing the Attorney General as an independent constitutional officer by six years, *see* PA. CONST. art. I, § 4.1 (May 16, 1978), and the Legislature's enactment of the Commonwealth Attorneys Act by eight years, *see* Act of October 15, 1980, P.L. 950, No. 164.² Indeed, the statutes at issue in *City of York* were repealed and replaced by the Commonwealth Attorneys Act. *See* Act of May 28, 1915, P.L. 616, *as amended*, 12 P.S. § 145, *repealed by* Act of April 28, 1978, P.L. 202, No. 53, § 2(a); The Administrative Code of April 9, 1929, P.L. 177, § 902, 71 P.S. § 292, *repealed by* Act of Oct. 15, 1980, P.L. 950, No. 164, § 503, 71 P.S. § 503, and *replaced with* 71 P.S. §§ 732-101, *et. seq.* So Transource's heavy reliance on *City of York* only serves to underscore its fundamental misapprehension of Pennsylvania law.

Even if the Commonwealth Attorneys Act was ambiguous (*it is not*), the Pennsylvania Supreme Court has held that “the Attorney General is the Commonwealth official statutorily charged with defending the constitutionality of *all* enactments passed by the General Assembly *** regardless of the nature of the constitutional challenge or the opinion of any other state official concerning a statute's validity.” *City of Phila. v. Commonwealth*, 838 A.2d 566, 583 (2003).

Lastly, if the Attorney General usurped the authority of the PUC, one would expect to hear from it. But the PUC has never contested the Attorney General's authority to intervene.

² Previously, “the Attorney General was appointed by the Governor, and served at his pleasure as a member of his cabinet.” *Commonwealth v. Carsia*, 517 A.2d 956, 957 (Pa. 1986).

III. TRANSOURCE STRAINS TO DOWNPLAY THE SIGNIFICANT SOVEREIGN INTERESTS IN PLAY

In contesting the Attorney General’s interest in defending state law, Transource highlights that the PUC is an “independent administrative commission.” Respondent’s Br. at 22. This begs a question: independent of whom?

State law answers this question: unlike an “executive agency,” an “independent agency” is “not subject to the policy supervision and control of the *Governor*.” 2 Pa. Cons. Stat. § 101; *Arneson v. Wolf*, 117 A.3d 374, 376 (Pa. Cmwlth. 2015), *aff’d*, 124 A.3d 1225 (Pa. 2015). There are many such agencies. 71 P.S. § 61; 24 Pa. Cons. Stat. § 8501(a). The PUC is also independent in the sense that it is funded, not by taxpayer dollars, but by “assessments and fees” on regulated utilities, which are placed in a restricted account. *See* 66 Pa. Cons. Stat. § 511. This independence is irrelevant here, and it certainly does not mean the PUC has a monopoly on whether to defend state law. Again, the PUC has never contested the Attorney General’s authority to intervene. Nor could it.

Nor does it matter that the challenge is to a law the PUC enforces. Attorneys General defend many laws that other agencies enforce. *See e.g. Allegheny Reproductive Health Ctr. v. Dep’t of Hum. Servs.*, ___ A.3d ___, 2026 WL 1053998, *9 (Pa. Cmwlth. 2026) (Attorney General granted intervention to defend state law prohibiting taxpayer funding of abortion, which the Department of Human Services enforces).

Transource seemingly believes that the challenged laws somehow belong to the PUC, and that the PUC can repeal (or partially repeal) a law by acquiescence

(even while acquiescing to the Attorney General’s authority to intervene). See *contra Berger*, 597 U.S. at 191-92. That would raise “grave challenges to the separation of powers.” *U.S. v. Windsor*, 570 U.S. 744, 762 (2013). These laws are the Commonwealth’s and reflect the democratic will of its citizens, as expressed through their elected representatives. And the Commonwealth has “practical interests” in “the continued enforceability of its” laws beyond the specific agency that enforces them. *Berger*, 597 U.S. at 184. The Commonwealth of Virginia highlighted many of these practical interests. See Amicus Brief at 10-14. The People of Pennsylvania have charged their Attorney General—not the PUC—with defending state laws and safeguarding the practical state interests at stake. See *Cameron*, 595 U.S. at 277; *City of Phila.*, 838 A.2d at 583.

Further, Transource seriously misreads *Cameron* and *Berger* in attempting to cabin their holdings. This Court did not limit state attorneys general’s interest in defending their laws to just facial challenges. Facial challenges are rare and “disfavored.” *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450-51 (2008). For the state laws at issue here, a facial challenge would be a legal impossibility. This statutory need requirement applies to both interstate and intrastate lines. 66 Pa. Cons. Stat. § 1501; 52 Pa.Code § 57.76(a)(1). There is no claim that Federal law preempts the latter. A state’s sovereign interest is still impaired when a law is found unconstitutional in fewer than “all its applications.” *Bucklew v. Precythe*, 587 U.S. 119, 138 (2019).

And the Third Circuit certainly did “call into question the ‘continued enforceability’” of state law. *Contra Respondent’s Br.* at 23. Transource’s mantra that this is a case about a “single [PUC] order” denying siting

approval for a “single” (\$500 million) project is hollow. *Id.* at 1, 3, 7, 13, 22-23, 25, 28, 31.

The Third Circuit held that the order denying Transource’s siting application was preempted *because* the PUC applied the state law need requirement. App.32a (recounting that the PUC denied the siting application because Transource “failed to establish the requisite ‘need’” for the project under 52 Pa.Code § 57.76(a)(1)). The result of that novel precedent is that Pennsylvania now may not determine whether an interstate transmission line is needed if PJM has included that project in its regional transmission expansion plan. Petitioners previously highlighted this impact, but, as Transource apparently missed it, we will repeat: other utilities are *already* arguing that the PUC is “preempted from denying [a] [p]roject based upon a finding that there is not a sufficient need for it.” Petition at 31-32, quoting Nextera Energy Application.

As Marc Christie highlighted, “[t]his case presents an issue of national importance,” and “[t]he stakes here are significant.” Amicus Brief at 8-9; *see also* Amicus Brief of Coalition to Protect Franklin County (highlighting due process violations landowners will suffer because of the Third Circuit’s merits decision). He would know best about the national impact of this case. After all, he is a former FERC Chairman *and* a former Chairman of the Virginia State Corporation Commission. But he is not the only expert on energy law to recognize the importance of this case. One law school professor has called this case “the 21st century legal canary in the coal mine” because it will decide “who will now control U.S. power over power.” Steven Ferry, *Constitutional Cutting Edge: Where Federal Planning Implied Preempts State Power*, 27 VT. J. ENVTL. L. 112, 153 (2025).

The Commonwealth also has a significant interest in protecting Pennsylvania consumers. Transource hand-waves this interest as unimportant. But the case law is to the contrary: the States have a “quasi-sovereign” interest in the “economic and commercial” well-being of its citizens. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 602, 606, 609 (1982); *Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 416-17 (1983) (noting State’s “police power” “to protect consumers” from rising energy prices). The Legislature has given the Consumer Advocate the discretionary authority to intervene when consumers’ interests are not being adequately protected. 71 P.S. § 309-4(a), (b). During the litigation, “[t]he potential and practical impact on the citizens and consumers of Pennsylvania” was the “concern” of the PUC. JA279 (PUC Decision). That is no longer the case, which is why the Consumer Advocate sought intervention.³

IV. PETITIONERS’ INTERVENTION REQUEST WAS TIMELY

Transource repeatedly asserts that Petitioners delayed intervention by “weeks.” Respondent’s Br. at 3, 13, 27. But that seriously muddles the timeline.

Recall that, initially, the PUC authorized the Attorney General, who was still then its counsel, to seek an extension for an *en banc* petition, and so counsel started preparing that petition. Nearly three weeks later, on September 29, 2025, the Attorney General learned for the first time that the PUC no longer wished to seek further review. The PUC did not supply its rationale for the turnabout until the week of Octo-

³ The Attorney General appoints the Consumer Advocate subject to Senate approval. 71 P.S. § 732-201(b).

ber 13, and thus the Attorney General could not evaluate it until then. Petitioners moved to intervene *days* later, on October 17. Petition at 11. That motion was timely.

“[T]he most important circumstance relating to timeliness is that the attorney general sought to intervene as soon as it became clear that the *Commonwealth’s interests would no longer be protected.*” *Cameron*, 595 U.S. at 279-80; see *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394 (1977). Transource, however, misstates this rule, asserting that the clock began to run when “it ‘became clear’ that the PUC would not *continue.*” Brief at 27. Under the properly stated rule, Petitioners could not assess whether the Commonwealth’s interests were “no longer protected” until they understood the PUC’s rationale. In Transource’s view, Petitioners should have filed a knee-jerk intervention, even when the client had not “explain[ed] its decision.” *Ibid.* That is not how responsible attorneys, especially those representing the public’s interests, behave.

Even if this Court accepted the dispositive date as September 29, 2025, when the PUC first told the Attorney General that it would not seek further appellate review, the motion to intervene was still timely. Transource’s contention that 18 days between this date and the date Petitioners filed their motion is an “extreme delay” is “rhetorical hyperbole.” *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 517 (1981) (plurality).

V. TRANSOURCE CANNOT CLAIM PREJUDICE FROM PETITIONERS FULFILLING THEIR OFFICIAL DUTIES

When Petitioners moved to intervene, the time to seek *en banc* or certiorari had not yet expired. *United Airlines*, 432 U.S. at 395 (intervention permitted where

motion to intervene was filed within time to appeal). The Attorney General, who had been defending the PUC since the inception of this suit, simply sought to take up the mantle. *Cameron*, 595 U.S. at 292 (Kagan, J., concurring). And yet, Transource claims prejudice because it did not expect the Attorney General to come to the defense of state law or the Consumer Advocate to the defense of consumers. That expectation, however, is not “reasonable” given this Court’s “clear” precedents and the duty state law places on the Attorney General to “defend the constitutionality of all statutes” and the Consumer Advocate to protect consumers. *Berger*, 597 U.S. at 192; *Cameron*, 595 U.S. at 282; 71 P.S. § 732-204(a)(3), (c); 71 P.S. § 309-4(a).

Transource is not entitled to a forfeit. The Court rejected that argument in *Cameron*. 595 U.S. at 282. Transource will not be prejudiced if this suit proceeds to finality, but the Commonwealth will be if it is deprived of a final at-bat.

Lastly, that “other avenues to address” the usurpation of state power may exist, *see* Respondent’s Br. at 33, does not preclude Petitioners from seeking vindication through the judiciary. Consistent with *Cameron* and *Berger*, different state officials may have different perspectives and approaches. The Attorney General and the Consumer Advocate have chosen to continue fighting in federal court.

* * *

The Third Circuit’s denial of intervention was so obviously contrary to the Court’s “many, clear, and recent” precedents that summary reversal is warranted. *Berger*, 597 U.S. at 192.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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